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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1969

**No. 523**

TRI VALLEY GROWERS, formerly known as Tri-Valley Packing Association (a corporation),
*Petitioner,*

vs.

FEDERAL TRADE COMMISSION,
*Respondent.*

## APPENDICES A, B, C, D, E and F to PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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**APPENDICES A, B, C, D, E and F**

**to**

**PETITION FOR A WRIT OF CERTIORARI**

**to the United States Court of Appeals**

**for the Ninth Circuit**

## Appendix "A"

United States of America
Before Federal Trade Commission

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

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| In the Matter of<br>Tri-Valley Packing Association,[1]<br>a corporation. | Docket No. 7225<br>Docket No. 7496 |

## *FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER*

Pursuant to the provisions of an Act of Congress, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U.S.C., Sec. 13), the Federal Trade Commission on August 6, 1958, issued and subsequently served upon the respondent named in the caption hereof its complaint in this proceeding, charging said respondent with having violated sub-

[1]Incorrectly named in the complaint in Docket No. 7225 as Tri-Valley Packing Association, Inc.

section (a) of Section 2 of said Clayton Act, as amended. The respondent's answer to said complaint was filed on October 22, 1958. Thereafter, the Commission, pursuant to the provisions of the aforesaid Act, on May 15, 1959, issued and subsequently served upon respondent a second complaint, charging respondent with having violated subsection (d) of Section 2 of said Act. The respondent's answer to the second complaint was filed on June 29, 1959. By order of the hearing examiner filed October 2, 1959, the proceedings initiated by the aforesaid complaints were consolidated into one proceeding. Hearings were thereafter held before duly designated hearing examiners of the Commission and testimony and other evidence in support of and in opposition to the allegations of both complaints were received into the record. In an initial decision filed August 4, 1961, the hearing examiner found that, with the exception of one allegation, the charges had been sustained by the evidence and ordered respondent to cease and desist from the practices found to be unlawful.

The Commission having considered the appeal of respondent from the initial decision and the entire record in this proceeding and having determined that the appeal should be denied, and having further determined that the initial decision should be vacated and set aside, now makes this its findings as to the facts, conclusions drawn therefrom and order to cease and desist which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

## *FINDINGS AS TO THE FACTS*

1. Respondent, Tri-Valley Packing Association, is a nonprofit, cooperative corporation organized, existing and doing business under the laws of the State of California, with its principal office and place of business located at 240 Battery Street, San Francisco, California.

2. Respondent is engaged in the business of selling and distributing canned fruits and vegetables of many varieties, all of which it processes and cans at its plants in Modesto, San Jose and Stockton, California. Respondent sells and distributes its canned fruits and vegetables under the private labels or brands of its purchasers and also under its own labels or brands.

3. Respondent sells products of like grade and quality to a large number of customers located throughout the United States for use, consumption, or resale therein, including wholesalers, retailers, chain stores and associations. Respondent's sales of its products are substantial, amounting in the fiscal year ending January 31, 1959, to $22,329,877.

4. In the course and conduct of its business, respondent has been and now is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

5. Respondent sells its products to retailers, such as chain stores and cooperative organizations, and to wholesalers who in turn sell to the retail trade. Certain of these customers, including some twelve to fifteen retail grocery chains, maintain buying agencies

in San Francisco. In the course and conduct of its business, respondent has sold its products to these customers at lower prices than it has sold products of like grade and quality to customers who did not maintain their own buying agencies. Included in the latter group were retailers and wholesalers who sell to the retail trade. The difference in prices charged customers who maintained buying agencies and those who did not range from five cents to fifty cents, or from two per cent to ten per cent, per case of respondent's products.

6. Respondent's customers also purchase canned fruits and vegetables from other packers and the products sold by respondent under a customer's private label are frequently commingled in the customer's warehouse with like products bearing the same label. These products are thereafter shipped by the customer either to its own retail outlets for resale to the public, or, in the case of a wholesaler, to smaller retailers for resale to the public.

7. The Commission finds that there have been numerous instances of price discriminations by respondent in favor of certain large chain stores and against wholesalers and retailers in the sale of canned fruits and vegetables of like grade and quality. The following are examples of such discriminations:

In February 1957, respondent sold products designated as Choice Heavy Halves Unpeeled Apricots to Fred Meyer, Inc., of Portland, Oregon, at $5.70 per case, and to Hudson House, Inc., of Portland, Oregon, at $6.15 per case.

In November 1957, respondent sold products designated as Choice Heavy Syrup Sliced Y. C. Peaches to A & P in Portland, Maine, at $4.90 per case, and to Hannaford Bros. Co., in Portland, Maine, at $5.30 per case.

In November 1957, respondent sold products designated as Choice Heavy Syrup Halves Y. C. Peaches to A & P in Pittsburgh, Pennsylvania, at $4.80 per case, and to Associated Grocers, Inc., in Pittsburgh, Pennsylvania, at $5.20 per case.

In February 1957, respondent sold products designated as Standard Light Syrup Pears to Safeway Stores in Denver, Colorado, at $6.10 per case, and to Associated Grocers in Denver, Colorado, at $6.50 per case.

In March 1957, respondent sold products designated as Choice Heavy Syrup Sliced Y. C. Peaches to Safeway Stores in Denver, Colorado, at $5.30 per case, and to H. A. Marr in Denver, Colorado, at $5.55 per case.

In each instance of such price discrimination, the chain store receiving the benefit of the discrimination was engaged in competition with one or more nonfavored purchasers in the sale at retail of food and grocery products, including canned fruits and vegetables sold under each purchaser's private label.

The Commission also finds that certain of said chain stores receiving the benefit of respondent's price discriminations have also been engaged in competition in the sale of food and grocery products with independent retailers who were selling private label canned goods which they had purchased from non-

favored wholesalers. For example, respondent discriminated in favor of Safeway Stores, a retail chain, and against H. A. Marr, a wholesaler, in the sale of goods of like grade and quality shipped to the Denver, Colorado, warehouses of these purchasers. The record shows that Foodland Supermarkets and Preisser Grocery and Market, both of Denver, Colorado, and Piggly Wiggly No. 10, and CeBuzz, Inc., both of Littleton, Colorado, purchased canned goods from H. A. Marr and resold such products at retail in direct competition with retail outlets of Safeway Stores.

8. The Commission further finds that the grocery business is highly competitive, that markups at various levels of distribution are affected by competition, and that the percentage of return on large volume of sales is small. The net profit of some wholesalers does not exceed the customary two and one-half per cent cash discount accorded for prompt payment and the net profit of certain retailers runs less than six per cent. A price difference of only ten cents a case would in some instances be sufficient to cause a purchaser of canned fruit or vegetables to buy from one packer instead of another, and a difference of a cent or two a can could cause the loss of a sale at the retail level. Under these circumstances, a difference in the price of canned goods ranging from two per cent to ten per cent is sufficient to give the purchasers paying the lower price a substantial advantage over their competitors. The effect of respondent's price discriminations, therefore, may be substantially to

injure, destroy or prevent competition between chain stores receiving the benefit of such discriminations and nonfavored retailers and retailer customers of nonfavored wholesalers.

9. Respondent claims that its lower prices to certain purchasers were made in good faith to meet the equally low prices of competitors. The competitors whose prices respondent claims to have met are those packers who maintain sales representatives in San Francisco and sell through such representatives to certain large purchasers, including favored chain stores, who maintain buying agents in that city. The market in which such sales are made is known as the San Francisco or "California Street" market. The buyers represented in this market, including said large chain stores, have usually paid less for the packers' products than buyers that purchase in other markets. Although the opening prices in the "California Street" market are ordinarily announced by the packers, the goods are not sold in appreciable volume unless the prices are satisfactory to the buyers.

Respondent has admitted that almost invariably the "market price" in this market is established below the range of opening prices. Although respondent was aware of all these facts and therefore knew, or should have known, that the lower prices of its competitors were discriminatory, it did not adduce evidence to show that it had reason to believe that such prices could have been cost justified or otherwise excused under Section 2(a). Since respondent has failed to prove that it had reason to believe that the prices

of its competitors were lawful, it has not established on the record that it acted in good faith in meeting such prices.

10. On the basis of the record herein, the Commission finds that respondent has discriminated in price between different purchasers in the sale of goods of like grade and quality in commerce and that the effect of such discriminations may be substantially to injure, destroy or prevent competition with purchasers receiving the benefit of such discriminations; and that respondent has failed to establish a valid defense under Section 2(b) of the Clayton Act, as amended.

11. With respect to the charge that respondent violated Section 2(d) of the Clayton Act, as amended, the record shows that respondent granted allowances to Fred Meyer, Inc., of Portland, Oregon, and to Central Grocers, Inc., of Boston, Massachusetts, as compensation or in consideration for services furnished by these purchasers in connection with the sale or offering for sale of products sold by respondent. There is also sufficient evidence to establish that, at approximately the same time these allowances were granted, respondent sold products of like grade and quality to other purchasers competing with Fred Meyer, Inc., and Central Grocers, Inc., in the distribution of such products. The record also shows that, with respect to each of the favored purchasers, the arrangement to grant the allowance was a specially tailored or negotiated deal involving promotional activities initiated by the purchaser. Neither of these deals was offered to competing purchasers and re-

spondent has failed to show that the allowances were made available to such competing purchasers on proportionally equal terms.

12. On the basis of the record herein, the Commission finds that respondent has granted allowances to certain customers for services rendered by such customers in connection with the sale of respondent's products without making such allowances available on proportionally equal terms to other customers competing in the distribution of such products.

## *CONCLUSIONS*

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The discriminations in price by respondent, as hereinabove found, constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended. The acts of respondent in granting allowances to certain customers, as hereinabove found, constitute violations of subsection (d) of Section 2 of the Clayton Act, as amended.

## *ORDER*

IT IS ORDERED that respondent, Tri-Valley Packing Association, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Discriminating in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with customers of such purchaser.
2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

IT IS FURTHER ORDERED that respondent, Tri-Valley Packing Association, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Commissioner Elman dissenting.

(Seal)

/s/ Joseph W Shea
Joseph W. Shea,
Secretary.

Issued: May 10, 1962

Attached are: Opinion of the Commission by Chairman Dixon and Dissenting Opinion of Commissioner Elman.

United States of America
Before Federal Trade Commission
Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

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| In the Matter of<br>Tri-Valley Packing Association,[1]<br>a corporation. | Docket No. 7225<br>Docket No. 7496 |

## *OPINION OF THE COMMISSION*

By Dixon, Commissioner:

This matter is before the Commission on the appeal of respondent, Tri-Valley Packing Association, from an initial decision of the hearing examiner holding that respondent had violated subsections (a) and (d) of Section 2 of the Clayton Act, as amended, and ordering respondent to cease and desist from the practices found to be unlawful.

We will consider first respondent's appeal from that part of the initial decision dealing with the charge of unlawful price discrimination. Respondent contends in this connection that the charge has not been sustained by the evidence and further contends that, even if a *prima facie* case had been proved, it

[1]Incorrectly named in the complaint in Docket No. 7225 as Tri-Valley Packing Association, Inc.

has established that its lower prices to certain purchasers were made in good faith to meet the equally low prices of competitors.

Respondent is engaged in the business of processing and canning fruits and vegetables which it sells to customers located throughout the United States. Its sales of these products are substantial, amounting in the fiscal year ending January 31, 1959, to $22,329,877.

There is no dispute, and the record fully supports the finding, that respondent has discriminated in price in favor of certain large chain stores and against various wholesalers and retailers in the sale of canned fruits and vegetables of like grade and quality. The record also shows that the favored chains, purchasing through their own direct buying agencies in San Francisco, consistently paid lower prices for respondent's goods than wholesalers and retailers, including cooperative organizations, that purchased respondent's goods through brokers. Counsel supporting the complaint has shown numerous instances of such price discriminations throughout various "trade areas" where the favored chains were generally engaged in competition with nonfavored retailers and with customers of nonfavored wholesalers.

In almost every instance where price discriminations have been shown to have occurred, both the favored and nonfavored customers purchased respondent's products for resale under their own private labels. There is also evidence that these customers also purchased canned products from other packers for resale under the same labels. Consequently, re-

spondent's products when received by their customers are usually commingled in the customer's warehouse with other products bearing the customer's label. They are thereafter shipped by the customer, either to its own stores for resale to the public, or, in the case of a wholesaler, to smaller independent retailers for resale to the public.

The principal argument made by respondent in this phase of its appeal is that counsel supporting the complaint has failed to prove that the aforementioned price discriminations have had the requisite adverse effect on competition. It contends in this connection that neither actual nor probable injury can be found to result from a price discrimination unless it is shown that actual competition existed between favored and nonfavored purchasers in the resale of the specific products involved in the discrimination. To support this argument, respondent points out that orders to cease and desist issued by the Commission in Section 2(a) cases ordinarily prohibit a seller from discriminating in price only between purchasers who, in fact, "compete in the resale and distribution" of the seller's products.

Relying primarily on the fact that its products lose their identity by being commingled with other products bearing identical labels, respondent states that there has been no showing of a single instance where a retail outlet operated by a nonfavored retailer or customer of a nonfavored wholesaler has, in fact, competed with outlets of favored chain stores in the resale of respondent's products of like grade

and quality. And respondent further contends that the facts do not support an inference that such competition exists since in any given trade area, as defined by counsel supporting the complaint, there are retail outlets of the favored chains that do not compete with any of the stores of nonfavored retailers or customers of nonfavored wholesalers, and, in the same trade area, there are stores of nonfavored retailers and customers of nonfavored wholesalers that do not compete with any of the outlets of the favored chains. In view of this fact, respondent argues that although it is possible that there might be competition in the resale of respondent's products to the public, it is also possible that there is no competition. Respondent claims, therefore, that since counsel supporting the complaint has failed to prove real or existing competition in the resale of its products, there can be no finding of actual or probable injury to competition stemming from the price discriminations.

This argument must be rejected. First of all, we do not agree with respondent that the record does not support a finding that in some instances, at least, the recipients of respondent's discriminatory prices were competing in the resale and distribution of the products involved in such discriminations. The fact that respondent's goods cannot be identified on the shelves of individual stores operated by the purchasers does not mean that the purchasers are not competing in the distribution of such goods. There can be no doubt, in this connection, that respondent's goods have been purchased for resale under its customers' private

labels. Since respondent's goods have been commingled with other products, the showing that favored and nonfavored purchasers have, in fact, competed in the sale of these private label goods would be sufficient in some instances to establish that they have competed in the resale of respondent's goods.

But more important, there is no substance to the contention that a violation of Section 2(a) must be predicated upon a showing of actual or probable injury to competition with the favored customer in the resale of the goods involved in the price discrimination. This contention confuses the element of price discrimination with the element of competitive injury and is obviously incorrect. In a case involving injury to competitors of the seller, for example, there may be no competition whatsoever between the recipients of the discriminatory prices in the resale of the seller's products. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). Nor is it necessary that such competition exist in cases involving injury to buyers. In *Corn Products Refining Company, et al. v. Federal Trade Commission*, 324 U.S. 726 (1945), there was no competition between purchasers in the resale of the product sold by respondent, since in that case the purchasers were using the product involved in the discrimination, glucose, as an ingredient in candy which they manufactured. Nor is it necessary that the goods involved in a price discrimination be resold in any form since the Act specifically states "where such commodities are sold for use, consump-

tion, or resale." [Underscoring supplied.] For example, discrimination in the price of gasoline sold to competing taxicab or truck fleets could have the effect of injuring competition with the purchaser receiving the lower price. Or injury could result from the difference in the price of machinery or other equipment sold to competing firms for use in the production of other goods.

As respondent has pointed out, Commission orders in Section 2(a) cases ordinarily prohibit a seller from discriminating in price between purchasers who, in fact, compete in the resale and distribution of the seller's products. This is due in part to the fact that in most price discrimination cases coming before us, favored and nonfavored purchasers have, in fact, been competing in the resale of the seller's products. The orders were, therefore, drafted in a form deemed adequate in those factual situations to prohibit discriminations having the requisite effect on competition. The Commission has not always adhered to this form, however. In *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37 (1948), for example, there was a factual situation somewhat similar to that involved in this matter in that the respondent had discriminated in price between retailers and wholesalers. The order issued in that case contained a paragraph which prohibited the respondent from discriminating in the price of products of like grade and quality "By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer." [Underscoring supplied.]

This inhibition was expressly approved by the Supreme Court.

In any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent (*Federal Trade Commission v. Morton Salt Company, supra*); and it has been held that such an inference is permissible despite testimony by the nonfavored purchaser that he had not been injured by the discrimination. *Moog Industries, Inc. v. Federal Trade Commission,* 238 F.2d 43 (1956); *E. Edelmann & Co. v. Federal Trade Commission,* 239 F.2d 152 (1956). Whether or not the differential in price is substantial must, of course, be determined from the facts in each case. As stated above, however, it is unnecessary to show that favored and nonfavored purchasers compete in the resale of the goods involved in the discrimination. And if such competition does exist, it is not necessary to show that the price differential was reflected in the price at which the goods were resold by the favored purchaser. *Corn Products Refining Company, et al., supra; Moog Industries, Inc. v. Federal Trade Commission, supra; E. Edelmann & Co. v. Federal Trade Commission, supra.*

The record in this case establishes the existence of competition between favored chains and nonfavored retailers in the sale of food and grocery products, including canned fruits and vegetables sold under each purchaser's private label. It may be true, as empha-

sized by respondent, that certain retail outlets operated by each of these purchasers did not compete with any outlets operated by the other purchaser. This is wholly irrelevant, however, since it is clear that the purchasers did compete through other outlets.

The record also establishes that the differences in the prices charged competing purchasers were substantial. These price differentials ranged from five cents to fifty cents, or from two per cent to ten per cent, per case. Respondent concedes that the grocery business is highly competitive, that markups at various levels of distribution are affected by competition, and that the percentage of return on large volume sales is small. The record also discloses that the net profit of some wholesalers does not exceed the customary two and one-half per cent cash discount accorded for prompt payment and that the net profit of certain retailers runs less than six per cent. There is also testimony that a price difference of only ten cents a case would be sufficient to cause a purchaser of canned fruit or vegetables to buy from one packer instead of another and that a difference of a cent or two a can could cause the loss of a sale at the retail level. Under these circumstances, we are of the opinion that the price differentials involved herein were sufficient to give the favored purchasers a substantial competitive advantage over retailers who purchased respondent's goods at the higher prices.

The record also supports the conclusion that respondent's price discriminations may have the effect of injuring competition between the favored chains

and retailer customers of nonfavored wholesalers. Although there is no evidence that any of these independent retailers actually sold any of respondent's goods, there is ample evidence to show that some of them sold a wholesaler's line of private label goods in competition with chain stores that had paid less for respondent's goods than had the wholesaler. Since respondent's goods were commingled with others under the wholesaler's private label, the higher price paid by the wholesaler for respondent's goods would necessarily be reflected in its cost of acquiring its private label line. In view of the small profit margin at the wholesale level, it may be reasonably inferred that this increased cost would be reflected in the price at which these products were sold by the wholesaler to its customers. Consequently, in those instances where it is shown that actual competition with favored chains did exist, we believe there is far more than a "remote possibility" that the competitive opportunities of the independent retailer were substantially injured as a result of the price discriminations.

Respondent next contends that the hearing examiner erred in holding that it had failed to justify its discriminatory pricing practices under the "meeting competition" defense contained in the Section 2(b) proviso. In order to establish this defense, respondent has the affirmative duty of proving that it reduced its prices to certain customers in good faith to meet the equally low price of a competitor. The Supreme Court in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951), clearly indicated that the lower

price which may be met by a seller under the proviso must be a "lawful" price. Certain it is, therefore, that as part of the good faith requirement of this defense, respondent must at least show the existence of circumstances which would lead a reasonable person to believe that the lower prices it was meeting were lawful prices.[2] This, however, respondent has not done. It has succeeded only in showing that a number of competitors, whose prices it claims to have met, had engaged in pricing practices whereby they had usually sold goods to certain favored customers at a "market price" which respondent admits was set by the buyer. The evidence offered by respondent does not indicate whether these prices could be cost justified or otherwise excused under any of the exceptions to the prohibitions of Section 2(a) or that respondent had reason to believe that they could be justified. We are of the opinion, therefore, that respondent has failed to establish the good faith requirement of the "meeting competition" defense and its argument on this point is rejected.

Respondent also takes issue with the hearing examiner's holding that it had violated Section 2(d) by granting allowances to certain customers for services rendered by them in connection with the sale of its products without making such allowances available on proportionally equal terms to other customers competing in the distribution of such products. Respondent concedes that it granted allowances to two retailers, Fred Meyer, Inc., and Central Grocers, Inc.,

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[2] *Standard Oil Co. v. Brown*, 238 F.2d 54 (5th Cir. 1956).

but it contends that these allowances had not been granted as compensation or in consideration for merchandising services furnished by such retailers and that the retailers receiving the allowances were not competing with other purchasers in the distribution of respondent's products.

With respect to the first point, respondent makes the somewhat frivolous argument that the allowances were used to promote goods sold under the retailers' label and not to promote the sale of goods packed under respondent's label. There is nothing in the language of Section 2(d) which indicates that the services or facilities furnished by the purchaser must be in connection with the "processing, handling, sale or offering for sale" of products bearing the seller's label or brand. The language clearly refers to furnishing of such services or facilities with respect to "any products or commodities manufactured, sold, or offered for sale" by the seller. The evidence in this case shows that respondent sold to the favored retailers canned goods packed under the retailers' labels and that it granted allowances for merchandising services furnished by such retailers in the resale of these private label goods.

As to respondent's contention that the recipients of the allowances were not competing with other purchasers in the distribution of respondent's products, the record shows that canned goods sold by respondent to Fred Meyer, Inc., and Central Grocers, Inc., were resold by these firms at retail in their respective trade areas in competition with nonfavored retailers

who were selling private label canned goods, some of which had been purchased from respondent. Respondent contends, however, that the nonfavored retailers also sold or distributed their private-label lines outside of these areas of competition and that it was, therefore, possible that all of respondent's goods bearing the retailers' private labels were sold outside of these areas. In so arguing, respondent is in effect saying that there is some likelihood that hundreds or thousands of items which have been commingled with a greater or lesser number of like items could be segregated by accident or chance. It would not be an overstatement to say that it would be virtually impossible for this to happen once, and respondent would have us believe that it happened on several occasions. Consequently, we must reject respondent's contention that there is insufficient evidence to support the finding that the aforementioned favored retailers do not compete with other purchasers in the distribution of respondent's products.

Although we are in general agreement with the conclusions reached by the hearing examiner in his initial decision, we are of the opinion that he has failed to make adequate findings of fact in support thereof. We are also of the opinion that that part of the hearing examiner's order to cease and desist relating to price discrimination is inadequate in two respects. In view of our holding that respondent's price discriminations may result in injury to competition regardless of whether there is actual competition in the resale and distribution of the products involved in

the discriminations, we believe that the phrase "in the resale and distribution of respondent's products" unduly limits the scope of the order and should be deleted therefrom. Furthermore, the order is deficient in that it does not prohibit respondent from selling to retailers at prices lower than prices charged wholesalers whose customers compete with such retailers.

The appeal of respondent is denied. The initial decision of the hearing examiner is vacated and set aside and we are issuing our own findings, conclusions and order to cease and desist in lieu thereof.

Commissioner Elman dissented to the decision herein.

May 10, 1962

United States of America
Before Federal Trade Commission

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

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| In the Matter of Tri-Valley Packing Association, a corporation. | Docket No. 7225<br>Docket No. 7496 |

*Commissioner Elman, dissenting:*

Most of the canned fruits and vegetables sold throughout the United States are produced and processed in California. Respondent, a farmer-owned and operated cooperative association, is one of a large number of canners which sell on the so-called "California Street" market in San Francisco. These canners sell most of their output in that market. Many large buyers, including retail grocery chains, wholesalers' groups, and institutional jobbers, maintain purchasing agents in the California Street market, and prices there tend to be lower than in other markets.

Trading in the California Street market, like other commodity exchanges, is free, open, and active, with frequent and sometimes very substantial price fluctuations occurring from one transaction to the next, resulting from the interaction of supply and demand

and other competitive factors. The Commission's opinion suggests, however, that the market is controlled by the large buyers, which use their purchasing power to exact discriminatory and illegal price concessions from sellers there.

Respondent is the only seller in the California Street market which has been charged by the Commission with making price discriminations in violation of Section 2(a) of the Robinson-Patman Act. It has asserted as a defense that its lower prices to buyers in this market were made in good faith to meet equally low prices of competing sellers. The Commission rejects this defense, finding that respondent "did not adduce evidence to show that it had reason to believe that the lower prices of its competitors could have been cost justified or otherwise excused under Section 2(a). Since respondent has failed to prove that it had reason to believe that the prices of its competitors were lawful, it has not established on the record that it acted in good faith in meeting such prices." (Finding of Fact No. 9)

It seems to me that there are two main objections to the Commission's holding.

## I.

First of all, the lower prices of its competitors which respondent met were not unlawful under Section 2 merely because they were "discriminatory." Under the explicit provisions of the statute, those prices would be illegal only (1) if they had the proscribed effects on competition; (2) if the differences

in price were not justified by differences in costs of manufacture, sale, or delivery; (3) if the lower prices were not in response to changing conditions affecting the market for or marketability of the goods concerned; and (4) if the lower prices were not offered in good faith to meet the equally low prices of competitors.

Where a seller in an active market meets the lower prices of other sellers and invokes the meeting-competition-in-good faith defense allowed by Section 2(b), considerations of elementary fairness, effective administration of the statute and the realities of a competitive market preclude imposition on him of a heavier burden than showing that he had no reason to suppose that the competitive lower prices he was meeting were unlawful. The law should not be construed as forcing a seller to compete at his peril. A "sales manager who is trying to compete * * * is not, of course, required to become a detective or a judge."[1] A businessman who must operate in the pressures of the marketplace cannot be expected to conduct a survey into his competitor's costs or to prophesy whether the competitor's lower price will later be held unlawful. Accordingly, if the statute is not to be made an impediment to free and fair price competition, the lower price met by a seller in good faith in a competitive situation should be deemed to be lawful if the seller shows that he neither knew nor had reason to believe that it was unlawful, *and* if no counter-showing is

[1]Corwin D. Edwards, "The Price Discrimination Law" (1959), p. 567.

made of facts known to the seller which would indicate to a reasonable and prudent businessman that the lower price was probably unlawful.[2]

There is no evidence here, and the Commission's opinion cites none, bearing upon the costs of competing sellers. That selling prices in the market were generally less than offering prices and were "satisfactory" to the buyers certainly does not make them illegal or show that they were not cost justified. Respondent presented evidence to show that price changes in the market were made in response to changing market conditions, competitive offers, inventory considerations, and other legitimate economic factors. The Commission's opinion refers to no specific evidence in rebuttal.

## II.

Secondly, assuming that this record does show that violations of the Robinson-Patman Act are known to be rampant in the California Street market, and for that reason respondent cannot rely on the meeting-competition-in-good-faith defense, why is it that, in the four years that have elapsed since this complaint was filed, the Commission has failed to bring price discrimination charges against any of respondent's

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[2]Since the ultimate fact to be determined is the seller's subjective good faith *vel non*, it is neither necessary nor sufficient for the Commission to rebut the defense by presenting objective proof of the illegality of the competing seller's lower price. Apart from the inconclusiveness of such proof, it would introduce into the proceeding tangential issues that "would involve trying many cases instead of one; records would be gargantuan, and clarity well nigh impossible." *E. Edelmann & Co.*, 51 F.T.C. 978, 997 (Initial Decision of Examiner Hier).

competitors or the large buyers which allegedly have induced the widespread illegal price concessions? The Commission cannot have it both ways. If the record in this proceeding establishes that sellers in the California Street market are unlawfully discriminating in price, it has not been explained why, on these same facts, Commission proceedings have been brought only against one seller. If, as complaint counsel argues that the record proves, "respondent obviously knew that the 'California Street' marketing price system was being used by large retail purchasers as a gimmick to obtain favorable treatment" from sellers there, then the Commission, which has made this record, "obviously knew" the same facts.

If this market is indeed "rigged" in favor of large buyers for whose business many competing sellers must scramble, the remedy is for the Commission to proceed on a general basis and not to enter an order which would only have the effect of driving a single, relatively small seller out of the market. The very domination of this market by the large buyers, which the Commission has found, will prevent respondent, and respondent alone, from being able to survive there. It is hard for me to see how such an order could serve the objectives which Congress sought to achieve in passing the Robinson-Patman Act.

May 10, 1962

## Appendix "B"

United States Court of Appeals
Ninth Circuit.

March 18, 1964.

No. 18125.

Tri-Valley Packing Association,
a Corporation,
Petitioner,
v.
Federal Trade Commission,
Respondent.

Francis Kerner and Ricardo J. Hecht, San Francisco, Cal., for petitioner.

James McI. Henderson, Gen. Counsel, J. B. Truly, Asst. Gen. Counsel, Harold D. Rhynedance, Jr., and Richard Whittington Whitlock, Attys., Federal Trade Commission, Washington, D. C., for respondent.

H. Thomas Austern, Gerry Levenberg and H. Edward Dunkelberger, Jr., Washington, D. C., for amicus curiae, National Canners Ass'n.

Before HAMLEY, JERTBERG and MERRILL, Circuit Judges.

HAMLEY, Circuit Judge:

This matter is before us on a petition to review a cease and desist order entered by the Federal Trade

Commission in consolidated proceedings before that agency. The petitioner, who was the respondent in the Commission proceedings, is Tri-Valley Packing Association, a farmer-owned and operated, non-profit, cooperative corporation. The National Canners Association has filed an amicus curiae brief in this court dealing with one aspect of the case and supporting the position of Tri-Valley.

The Commission order under review requires Tri-Valley to cease and desist from discriminating in the price of food products sold in interstate commerce, in violation of section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526 (Act), 15 U.S.C. § 13(a) (1958). The order also requires Tri-Valley to cease and desist from giving promotional allowances to any customer, in violation of section 2(d) of the Act, 15 U.S.C. § 13(d).

Tri-Valley is engaged in the business of selling and distributing canned fruits and vegetables, all of which it processes and cans at its plants in Modesto, San Jose and Stockton, California. The Association sells and distributes these products under the private labels or brands of its purchasers and also under its own labels or brands. In the course of this business products of like grade and quality are sold to a large number of customers located throughout the United States for use, consumption or resale. For the fiscal year ending January 31, 1959, the Association's sales amounted to $22,329,877.

Among Tri-Valley's customers are wholesalers, retailers, chain stores and associations. Certain of these

customers, including some twelve to fifteen retail grocery chains, maintain buying agencies in San Francisco. In the course and conduct of its business, Tri-Valley has sold its products to these customers, in what is colloquially known as the "California Street" market, at lower prices than it has sold products of like grade and quality to customers who did not maintain their own buying agencies in San Francisco. Included in the latter group were retailers, and wholesalers who sell to the retail trade. The difference in prices charged customers who maintained buying agencies, and those who did not, ranges from five cents to fifty cents, or from two per cent to ten per cent, per case.

Tri-Valley's customers also purchased canned fruits and vegetables from other packers, sometimes under the same private label under which similar products were purchased from Tri-Valley, and sometimes under the labels or brands of the other packers. These products, whether purchased from Tri-Valley or another packer, were thereafter shipped by the customer either to its own retail outlets for resale to the public or, in the case of a wholesaler, to independent retailers for resale to the public, and to hotels and restaurants.

In the course of its business, Tri-Valley also granted certain allowances to Central Grocers, Inc. of Boston, Massachusetts, and to Fred Meyer, Inc. of Portland, Oregon. Each of these allowances was granted pursuant to a specially tailored or negotiated arrangement. No arrangement on proportionally

equal terms was offered or made available to other purchasers of Tri-Valley products serving, at least in part, the same areas served by Central Grocers and Meyer.

On August 6, 1958, the Commission issued a complaint against Tri-Valley in its Docket 7225, charging violations of section 2(a) of the Act. In its answer to this complaint Tri-Valley denied most of the essential allegations,[1] and interposed three separate defenses. The only one of these defenses which the Association thereafter relied upon was that the lower prices were made in good faith to meet an equally low price of a competitor as permitted under the proviso to section 2(b) of the Act, 15 U.S.C. § 13(b).

On May 15, 1959, the Commission issued a complaint against Tri-Valley in its Docket 7496, charging violations of section 2(d) of the Act. In its answer to this complaint Tri-Valley denied, generally, most of the essential allegations of the complaint.[2]

The two proceedings were consolidated and protracted hearings were held before a hearing examiner. The hearing examiner filed an initial decision in which he concluded that the allegations of the complaints were sustained by the evidence, except as to injury to competition in the "primary line," *i. e.*, injury at the seller level. The examiner issued a cease-and-desist

[1]Tri-Valley did admit that it is in competition with other corporations engaged in the same business, and that some of its purchasers are directly or indirectly in competition with each other in the resale of its products.

[2]It did, however, make the same admissions as were made in its answer to the complaint in Docket 7225, referred to in note 1.

order whereupon Tri-Valley appealed to the Commission. The Commission, Commissioner Elman dissenting, set aside the initial decision and order and filed its own findings of fact, conclusions of laws and cease-and-desist order, accompanied by an opinion. This review followed.

We first consider the arguments relating to the price-discrimination feature of the order under review.

Tri-Valley argues that, with regard to the charge of price discrimination, the Commission adjudicated issues not raised in the complaint and at the hearings. In doing so, the Association asserts, the Commission failed to comply with the notice requirements of section 3.6 of the Commission's rules of practice for adjudicative proceedings, 16 C.F.R. § 3.6, section 5(a) of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. § 1004 (a) (1958), and section 11 of the Clayton Act, as amended, 64 Stat. 1126, as amended, 15 U.S.C. § 21. Moreover, petitioner argues, such action deprived it of due process of law as guaranteed by the Fifth Amendment.

The asserted departures of the Commission findings of fact from the allegations of the complaint have to do with the identity of the purchasers affected by the price discrimination and the kind of competition adversely affected thereby.

One of the elements of the offense proscribed by section 2(a) is that a seller "* * * discriminate in price between different purchasers of commodities of like grade and quality * * * where such commodities

are sold for use, consumption, or resale * * *." There is, as petitioner concedes, no requirement that there be favored and unfavored purchasers who compete with each other in the resale of the seller's product,[3] or, indeed, that they compete with each other at all.[4] But because it was alleged, in paragraphs four, five and the second subparagraph of paragraph six of the complaint, that the favored and unfavored purchasers competed with each other, directly or indirectly,[5] in the resale of Tri-Valley products, petitioner urges that the complaint so limited the class of purchasers alleged to have been affected by the price discrimination.[6]

The second element of the offense proscribed by section 2(a) is that:

> "* * * the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

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[3]See Corn Products Refining Co. v. Federal Trade Comm'n, 324 U.S. 726, 731, 65 S.Ct. 961, 89 L.Ed. 1320.

[4]See Federal Trade Comm'n v. Anheuser-Busch, Inc., 363 U.S. 536, 542, 80 S.Ct. 1267, 4 L.Ed.2d 1385.

[5]In the context of this case, "indirect" competition between purchasers occurs when a retailer who obtains his goods from a disfavored wholesaler-purchaser is in competition with a favored retailer-purchaser.

[6]Petitioner also contends that, because of the great multitude and variety of purchasers who may be involved in price discrimination practices, it was incumbent upon the Commission, under the notice provisions of the rule and statutes referred to above, to allege these facts limiting and restricting the classes of alleged purchasers to those actually involved in this case.

As indicated above, this competition need not be in the resale of the seller's products, nor need it be competition between favored and nonfavored purchasers from the accused seller. But because it was alleged in paragraphs four, five and the second subparagraph of paragraph six of the complaint, that the favored and nonfavored purchasers competed with each other, directly or indirectly, in the resale of *Tri-Valley* products, petitioners contend that the complaint so limited the kind of competition alleged to have been adversely affected by the asserted price discrimination.[7]

In the findings of fact incorporated in the initial decision of the examiner, it was found generally, and also with respect to seven specified sets of favored and disfavored purchasers, that such purchasers are competitively engaged in the resale of Tri-Valley products.[8] Thus, both as to the identity of purchasers and the kind of affected competition, the findings of the examiner did not go beyond what petitioner asserts are the limited allegations of the complaint.

But the Commission, upon its review of the initial decision, vacated the examiner's findings and entered new findings. In these new findings the class of af-

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[7]Petitioner also argues with regard to competition, as it does concerning purchasers, that the notice requirements referred to above necessitated these allegations delineating the lines of commerce and the competitive situations actually involved in the charge.

[8]See examiner's findings of fact Nos. 9, 12, 15, 18, 21, 24, 27 and 29. At a later point in his initial decision the examiner discussed the sufficiency of the evidence to show competition of this kind, and concluded that the evidence was sufficient.

fected purchasers and the kind of affected competition were not confined to, nor do they necessarily include, purchasers who directly or indirectly compete with each other in the resale of *Tri-Valley* products, or competition of that kind. In the new findings the class of affected purchasers was found to be that in which purchasers competed, directly or indirectly, in the resale of canned fruits and vegetables under each purchaser's private label.

Commission counsel apparently believes that the point petitioner is trying to make on this branch of the case is that whereas the complaint charged competition between favored and disfavored purchasers in the resale of Tri-Valley *products,* the findings refer to the competition as involving the resale of Tri-Valley's *private label* products. If this is the gist of petitioner's argument we agree with Commission counsel that it is without merit. The word "products" covers all of petitioner's products, including those packed under private label.

But, as we understand petitioner's contention, the asserted variance between complaint and findings is not premised on the distinction between "products" and "private label products." Instead, it is premised on the view that whereas the complaint limits purchasers and competition by referring to competition in the resale of *Tri-Valley* products, the Commission findings do not limit affected competition to that involving resale of Tri-Valley products, but include any competition in the resale of canned fruits and vegetables under each purchaser's private label.

Despite the allegations of paragraphs four and five, and of the second subparagraph of paragraph six of the complaint, upon which petitioner relies, we think it problematical whether petitioner was entitled to assume that the alleged price discriminations would be limited to purchasers who competed in the resale of *Tri-Valley* products, and to competition of that kind. It is true that the indicated paragraphs of the complaint are so limited in their allegations. But paragraph six of the complaint, in which six "illustrations of representative discriminations" are set out, contains five other subparagraphs in which no such limitations as to purchasers or competition are indicated. Each such subparagraph refers only to a named favored purchaser and a named "competing" nonfavored purchaser, and a reference to the sale of "similar" products.

In applying to the examiner for a bill of particulars, Tri-Valley did not take its present position concerning the scope of the complaint. It then argued that the complaint "* * * is not reasonably definite as to the *purchasers* and *commodities* involved. (Emphasis is in original.) In its points and authorities filed in support of that motion petitioner argued that: "[t]his very general allegation [of paragraph five] clearly includes all of respondent's purchasers and all of its customers." Referring to the six specific illustrations set out in paragraph six of the complaint, the Association argued, in this memorandum to the examiner:

> "There is nothing in the law or in logic which entitles either respondent [Tri-Valley] or its

counsel reasonably to assume that counsel in support of the Complaint will not adduce evidence of *non-representative discriminations,* and for years other than 1957." (Emphasis is in original.)

Likewise, in its points and authorities in support of its motion made before the examiner to quash and limit the staff's subpoena duces tecum, Tri-Valley did not indicate that it construed the complaint as limiting the purchasers to those who compete in the sale of Tri-Valley products, or as similarly limiting the affected competition.[9] In our examination of the voluminous record of the hearings before the examiner we failed to note a single instance in which counsel for petitioner objected to questions relating to competition on the specific ground that they were not limited to competition between favored and disfavored purchasers in the sale of Tri-Valley products.

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[9]In that memorandum, the petitioner said, in part:

"The allegations of this paragraph [five] likewise confine the charge to competing buyers who buy *goods of like grade and quality.*

* * * * *

"* * * the very general charges of discrimination contained in the complaint [referring to paragraphs five and six] involve only *competing buyers, purchasing goods of like grade and quality.*" (Emphasis in original.)

In its brief to the Commission on that interlocutory appeal, petitioner said, in part:

"* * * where the pleadings limit the issue to discriminations in price between different *competing* purchasers buying respondent's products of *like grade and quality for resale?*" (Emphasis in original.)

* * * * *

"It has been shown by reference to the Complaint and to the Answer that the issue herein is solely whether respondent has discriminated in price between *competing* buyers purchasing its *goods of like grade and quality for resale.*" (Emphasis in original.)

But, if it be assumed that the complaint so limited the identity of the affected purchasers and competition, we think no prejudice was shown. In this court Tri-Valley suggests some lines of cross examination it might have pursued, and some kinds of rebuttal evidence it might have produced, designed to deal with the assertedly enlarged class of affected purchasers and kind of affected competition dealt with in the Commission findings. However, it did not apply to this court for leave to adduce additional evidence, as it might have done under section 11(c) of the Clayton Act, as amended, 73 Stat. 243, 15 U.S.C. § 21(c).[10]

No such application having been made, Tri-Valley is not in a position to argue that it is aggrieved by the lack of notice, in the respects described, as to the issues to be adjudicated. E. B. Muller & Co. v. Federal Trade Comm'n, 6 Cir., 142 F.2d 511, 519.[11]

We therefore conclude that the Commission order should not be set aside on the ground that the Commission adjudicated issues not raised in the complaint and at the hearings.[12]

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[10]Nor did petitioner, insofar as we can ascertain from the record, apply to the Commission to reopen the proceeding for that purpose when it learned, from the Commission's findings, that such purchasers and competition were not limited to those involving Tri-Valley Products.

[11]See, also, Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 226, 59 S.Ct. 206, 83 L.Ed. 126; Coca-Cola Bottling Co. v. National Labor Relations Board, 8 Cir., 195 F.2d 955, 956.

[12]What has just been said also calls for rejection of the argument that a prima facie case was not proved because there was a failure to show by substantial evidence that Tri-Valley's favored and non-favored purchasers in fact competed with each other in the resale of Tri-Valley products of like grade and quality.

A third argument advanced by the Association on the price-discrimination feature of the case is that the Commission findings to the effect that there was actual competition in the resale of private label canned goods are not supported by reliable, probative and substantial evidence. This is true, Tri-Valley argues "* * * because the evidence upon which they are based is of an inferior character or degree, and is therefore, *not reliable evidence.*" (Emphasis is in original.)

The Commission found that there have been "numerous instances" of price discrimination by Tri-Valley in favor of certain large chain stores and against wholesalers and retailers in the sale of canned fruits and vegetables of like grade and quality. Five examples of such discriminations involving favored and nonfavored retailers are set out in the findings, it being stated that in each instance the chain store receiving the benefit of the discrimination was engaged in competition with one or more nonfavored purchasers in the sale at retail of food and grocery products "including canned fruits and vegetables sold under each purchaser's private label."

The last of these five examples, as stated in the findings, is as follows:

> "In March 1957, respondent [Tri-Valley] sold products designated as Choice Heavy Syrup Sliced Y. C. Peaches to Safeway Stores in Denver, Colorado, at $5.30 per case, and to H. A. Marr in Denver, Colorado, at $5.55 per case."

Tri-Valley points out, as further indicated in another connection at a later point in this opinion, that

Marr may have purchased a substantial portion of its private label line at the lower prices which Tri-Valley sold to Safeway in Denver. This is immaterial for present purposes, however, because Marr did pay Tri-Valley more than Safeway for canned peaches purchased in March, 1957, as the Commission found on unchallenged evidence.

Safeway is a retailer, and Marr is both a wholesaler and a retailer in the Denver, Colorado area. It is shown in the Commission's exhibit No. 44 that, in March, 1957, Tri-Valley sold peaches of like grade and quality to Safeway at $5.30 per case, and to Marr at $5.55 per case, a price differential of 4.5 per cent. The supply manager for Safeway testified that Safeway purchased only private label *merchandise from* Tri-Valley, these labels being Town House and Highway.

A witness who held a responsible position with Marr in 1957, testified that the Marr private labels in that year were Brimfull, Marco and Big M. A witness who had been a buyer for Marr in 1957 testified that fruit cocktail purchased by Marr from Tri-Valley in 1957, would "probably" carry Marr's Marco label; that apricots would "probably" carry Marr's Brimfull label, pears "possibly" the Brimfull label, and peaches "Brimfull." This witness testified that, in its retail operations Marr competed "with the established people in this market doing business, such as Safeway, Miller and King, and some independent merchants perhaps."

Tri-Valley argues that because the witness used the words "such as" in referring to Marr's retail competition with Safeway and others, because this witness did not explicitly state that there was such competition in 1957, and because "(n)o facts" were elicited to support the witness' conclusion respecting this competition, the Commission finding that such competition existed in 1957 is without substantial support in the record.

Reading the whole testimony of this witness we are convinced that he was talking about competition in 1957, and that, in using the words "such as," the witness did not mean to indicate doubt as to whether Safeway was one of the competitors. The Commission staff could have made a stronger showing as to competition by producing evidence as to the proximity of Marr and Safeway retail stores, and other evidence tending to support the witness' statement. We are unable to say, however, that because such additional evidence was not produced, the Commission was not entitled to accept the statement of the Marr buyer that such competition existed.

While the evidence was inadequate as to whether canned pears, purchased by Marr from Tri-Valley in 1957, carried the Marr private label, the testimony being "possibly," it was entirely adequate as to canned fruit cocktail and apricots, the testimony being "probably," and as to canned peaches, no qualification being expressed. As before indicated the 1957 price discrimination between Safeway and Marr was as to canned peaches.

In addition to the five examples set out in the Commission findings of fact, wherein favored and nonfavored purchasers were found to be in competition as retailers, the Commission also found that there had been what we have termed "indirect" competition between favored and nonfavored purchasers.[13] Specifically, the Commission found that certain chain stores receiving the benefit of Tri-Valley's price discriminations have also been engaged in competition in the sale of food and grocery products with independent retailers who were selling private label canned goods which they had purchased from unfavored wholesalers.

The Commission findings set out this example of competition of this kind:

> "For example, respondent [Tri-Valley] discriminated in favor of Safeway Stores, a retail chain, and against H. A. Marr, a wholesaler, in the sale of goods of like grade and quality shipped to Denver, Colorado warehouses of these purchasers. The record shows that Foodland Supermarkets and Preisser Grocery and Market, both of Denver, Colorado, and Piggly Wiggly No. 10, and CeBuzz, Inc., both of Littleton, Colorado, purchased canned foods from H. A. Marr and resold such products at retail in direct competition with retail outlets of Safeway Stores."

We have already adverted to the evidence showing that there were price discriminations favoring Safeway over Marr in the Denver, Colorado area in 1957. In our opinion, the evidence of record is sufficient to support the Commission finding that Foodland, Preis-

[13] See note 5.

ser, Piggly Wiggly No. 10 and CeBuzz were all in actual competition with Safeway in the Denver area in 1957, in the resale of private label canned goods of the kind which each obtained that year from Tri-Valley.

The findings as to actual direct and indirect competition between purchasers in the Denver area provides a sufficient factual basis, insofar as the existence of actual competition is concerned, for the cease-and-desist order relating to section 2(a), whether or not similar findings involving other purchasers and areas are supported by the record. It is therefore unnecessary to review herein the evidentiary support for these similar findings. We may say, however, that while the evidence concerning the existence of actual direct and indirect competition between purchasers is weak and perhaps insufficient with regard to some of these other purchasers and areas, we find it, for most purchasers and areas, sufficient to support the Commission findings.

The Association challenges, on several grounds, the Commission finding that the effect of Tri-Valley's price discrimination:

> "* * * may be substantially to injure, destroy or prevent competition between chain stores receiving the benefit of such discriminations and nonfavored retailers and retailer customers of nonfavored wholesalers."[14]

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[14] As a basis for this finding, the Commission first found as follows:

> "8. The Commission further finds that the grocery business is highly competitive, that markups at various levels of distribution are affected by competition, and that the per-

This finding that the effect of the price competition "may be" substantially to injure competition, was essential to establish, under the circumstances of this case, a proscribed price discrimination within the meaning of section 2(a). The Commission, however, was not required to find that there had been actual injury to such competition, and it made no such finding. See Federal Trade Comm'n v. Morton Salt Co., 334 U.S. 37, 46, 68 S.Ct. 822, 92 L.Ed. 1196. We make this observation because part of Tri-Valley's argument on this point seems to be made on the erroneous assumption that the Commission made a finding of actual competitive injury, it being urged that the evidence does not support that finding. But there are other facets to appellant's argument, which we now discuss.

One respect in which the evidence of probable competitive injury is inadequate, Tri-Valley contends, is in the failure to show the cost to any purchaser, whether favored or nonfavored, of acquiring their lines or inventories of private label goods purchased from various canners, including petitioner. The most that can be said for the evidence in this regard, the

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centage of return on large volume of sale is small. The net profit of some wholesalers does not exceed the customary two and one-half per cent cash discount accorded for prompt payment and the net profit of certain retailers runs less than six per cent. A price difference of only ten cents a case would in some instances be sufficient to cause a purchaser of canned fruit or vegetables to buy from one packer instead of another, and a difference of a cent or two a can could cause the loss of a sale at the retail level. Under these circumstances, a difference in the price of canned goods ranging from two per cent to ten per cent is sufficient to give the purchasers paying the lower price a substantial advantage over their competitors."

Association asserts, is that it is open to inferences that its prices might or might not have had the effect of increasing or diminishing the cost of the inventories to the purchasers. This is insufficient, Tri-Valley urges, to cast upon it the burden of proving that the undisclosed facts pertaining to prices paid other suppliers and other costs of acquiring the inventories are such as to forbid the inference that Tri-Valley's differentials did increase the costs thereof to the nonfavored buyers or their customers.

We are unable to appreciate the problem which Tri-Valley poses. There was evidence that certain nonfavored purchasers paid Tri-Valley more for private label canned goods than was paid Tri-Valley by certain competing favored purchasers. This seems to us direct evidence that it cost the nonfavored purchasers more to acquire their lines or inventories of private label goods purchased from various canners, including Tri-Valley, than in the case of favored purchasers purchasing from various canners, including Tri-Valley. Without regard to the proportionate amount of canned goods nonfavored purchasers obtained from Tri-Valley as compared to other canners, the dollar amount of the price discrimination must have been reflected in the cost of acquiring the inventory.

The Association further argues that the Commission staff did not adduce any evidence that Tri-Valley's prices had any influence on the resale prices of any products. It urges that a price difference does not *per se* have the proscribed effect on competition. To be illegal, Tri-Valley asserts, a price difference

must be substantial, and to be substantial, it must have a measurable effect on the competitive relationship.

We need not decide whether, in order to show that a price difference is substantial it must be established that it has some measurable impact on resale prices. For here there is adequate evidence that the price discriminations had such an impact. There was testimony that those engaged in the resale of such products operate on a very narrow margin—so narrow, in fact, that it is essential to take advantage of two per cent discounts for cash. The price discriminations, on the other hand, ranged from two per cent to ten per cent.

This would indicate that nonfavored retailers, and retailers who purchased from nonfavored wholesalers, were required to maintain retail prices at least two per cent higher than those of favored retailers in order to realize any appreciable profit on retail sales. In view of the highly competitive nature of the business, price disparities of this kind could well endanger the ability of these merchants to compete with favored retailers, or so the Commission could find.

Finally, on the question of competitive injury, Tri-Valley argues that there is lacking any causal connection between the price discrimination and any competitive injury nonfavored purchasers may suffer by reason of such price discrimination. This is true, petitioner contends, because the evidence affirmatively shows that the nonfavored buyers could have availed

themselves of the lower prices for which Tri-Valley and its competitors sold these goods in San Francisco.

The probability of competitive detriment on the buyer level presupposes a causal link between the seller's prices and the impact on customer competition. See Rowe, Price Discrimination under the Robinson-Patman Act, (1962) §§ 6.8, 8.5, pp. 139, 186. As Rowe indicates, the lack of a causal nexus between challenged price and asserted detriment to competition may be established in a number of ways, one being that the goods were and are available at the lower price from another source.[15] To be more specific, if the lower price would have been available to the nonfavored buyer in the same market where the favored buyer made his purchase, the probability of competitive injury due to the fact that the nonfavored buyer paid more for the product is not the result of price discrimination but of the nonfavored buyer's failure to take advantage of the opportunity, equally available to him, of buying at the same low prices.[16]

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[15]Rowe, supra, § 8.5, pp. 186, 193-195.

[16]As stated in the Report of the Attorney General's Committee to Study Antitrust Laws (1950), pp. 164-165:

> "Nor should a competitive price reduction be singled out as responsible for 'injury' if alternative means of access to goods at the lower price are in any event available to the buyer."

A reverse application of this principle, not pertinent in our case, is where the lower price received by a favored buyer from an accused seller would in any event have been available to the favored buyer from another source. See Rowe, supra, § 8.5, pp. 186, 193-195. This application of the principle under discussion is not pertinent here because Tri-Valley is the only source of the products in question.

Tri-Valley asserted before the Commission, and reasserts here, that there is nothing in the record to indicate that there was or is any obstacle which prevented or prevents nonfavored purchasers from buying Tri-Valley products in the so-called "California Street" market in San Francisco, where they would have obtained the same low prices that were offered to favored purchasers in that market. Tri-Valley also calls attention to testimony tending to show that H. A. Marr, a wholesaler and retailer in the Denver area, whose business has been discussed earlier in this opinion, purchased a good portion of its Tri-Valley products through a San Francisco broker who operated in the California Street market where Tri-Valley offered its low prices.

While Tri-Valley presented before the Commission the factual basis upon which this argument is made, it did no more than suggest the legal question which it now urges concerning the necessity of a causal connection between price differentials and probable competitive injury. This may explain why the Commission did not deal with the problem in its opinion or findings. Nor have Commission counsel dealt with the contention in their brief in this court.

Disposition of this question is dependent upon the facts pertaining to the availability, to nonfavored purchasers, of the low prices for Tri-Valley products on the California Street market, and the application of the law to those facts. It is not our function to find these facts, and the Commission should first speak as to the application of the law to the facts which are

found. We have therefore concluded that the proceedings should be remanded to the Commission for that purpose unless we can and do determine, on this review, that Tri-Valley established a defense which exculpates it even if there have been section 2(a) price discriminations.

We refer to the "meeting of competition" defense asserted in petitioner's third affirmative defense. It is with regard to this issue alone that the National Canners Association has filed an amicus curiae brief in support of petitioner's position. This defense is based on the proviso appended to section 2(b) of the Act, 15 U.S.C. § 13(b).

Under this "meeting of competition" proviso a seller who has discriminated in prices between different purchasers of commodities of like grade and quality, sold for use, consumption or resale, the effect of which may be to lessen or tend to injure competition, contrary to section 2(a) of the Act, may nevertheless exculpate himself by showing that he acted in self-defense. The burden of establishing the section 2(b) defense is upon the seller. Federal Trade Comm'n v. Sun Oil Co., 371 U.S. 505, 514, 83 S.Ct. 358, 9 L.Ed. 2d 466.

Tri-Valley claimed in the agency proceedings that its lower prices to certain purchasers were made in good faith to meet the prices of competing packers in the California Street market. The Commission found and concluded, however, that the showing made by petitioner concerning the necessity of meeting com-

petition in California Street, was insufficient to establish a valid defense under section 2(b).

The canners and processors who participate in the California Street market sell most of their products in that market. As of 1957, the prices paid for goods in this market tended to be lower than the prices paid for the same or similar goods by purchasers who were not represented in it.

At the beginning of the pack year, the canners and processors who sell on the California Street market determine from their records the amount of goods sold to various buyers in previous years. The sellers then attempt to obtain "reservations" from the buyers for a given amount of merchandise to be delivered during the buying season, preferably in excess of that previously purchased.[17]

After the reservations have been entered into, the canners announce their "opening prices." These opening prices are usually announced by the large or important factors in the industry comprised of the three or four nationally-advertised brand packers, or independent packers, of a particular commodity. When these price leaders have named their opening prices, the other canners, after examining their costs, will usually follow and name prices which are substantially similar to those of the leaders.

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[17] A "reservation" is a booking which the prospective buyer places with the seller. It is not a contract, but is in the nature of a memorandum which usually does not state the price of the goods. Under it, the seller is not obliged to deliver, and the buyer is not obliged to accept, unless there is a meeting of minds on the price.

After the opening prices have been announced, they are analyzed by the buyers, who then set the market price at the level of the lowest prices offered by reliable canners, and proceed to place their orders. A canner whose prices are in line with the established prices will receive a fair share of shipping instructions. If he does not, or if he receives instructions only for limited quantities, the canner checks with the brokers, buyers or with other canners to determine the reason.

In holding that Tri-Valley had failed to establish a valid defense under section 2(b), the Commission referred briefly in its findings to the operation of the California Street market and then found and concluded as follows:

> "Although the opening prices in the 'California Street' market are ordinarily announced by the packers, the goods are not sold in appreciable volume unless the prices are satisfactory to the buyers.
>
> "Respondent has admitted that almost invariably the 'market price' in this market is established below the range of opening prices. Although respondent was aware of all these facts and therefore knew, or should have known, that the lower prices of its competitors were discriminatory, it did not adduce evidence to show that it had reason to believe that such prices could have been cost justified or otherwise excused under Section 2(a). Since respondent has failed to prove that it had reason to believe that the prices of its competitors were lawful, it has not established on the record that it acted in good faith in meeting such prices."

The Commission thus held, in effect, that where a seller knows, or should have known, that the lower prices of its competitors were discriminatory, the meeting of such competition is not in "good faith" within the meaning of section 2(b) unless such seller had reason to believe that the competitor's prices could have been cost justified or otherwise excused under section 2(a).[18] Applying that proposition in this case, the Commission, as indicated by the above-quoted finding and conclusion, determined that Tri-Valley knew, or should have known, that the lower prices of its competitors were discriminatory, and yet it failed to adduce evidence to show that it had reason to believe that such prices could have been cost justified or otherwise excused under section 2(a).

In its accompanying opinion, the Commission seems to have expressed a broader view concerning petitioner's burden of proof, one which would seemingly apply whether or not the petitioner knew, or should have known, that the competing prices were discriminatory. That view is that, as a part of the good faith requirement of this defense, petitioner had the burden of showing the existence of circumstances which would lead a reasonable person to believe that the lower prices it was meeting were lawful prices.

In their brief on this appeal the Commission counsel defend the Commission view as stated in the

[18]Price differentials are excusable under section 2(a), if they make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered, or if made in response to changing conditions affecting the market or the marketability of the goods concerned.

quoted findings, and apparently also the broader view expressed in the Commission's opinion. But Commission counsel also suggest another basis for the determination that the "meeting of competition" defense had not been established. This basis, which may be preferred by Commission counsel since it is presented first, is that a lowered price is within the proviso of section 2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system, such as that represented by the California Street market.

This would appear to be a threshold question which ought to be resolved before questions concerning the duty of a seller to adduce evidence as to the lawfulness of competitive prices, or as to the seller's knowledge of such lawfulness, are reached. If, as Commission counsel now contend, Tri-Valley was not engaged, in the California Street market, in meeting "an equally low price of a competitor," within the meaning of proviso to section 2(b), that is the end of the matter, insofar as that defense is concerned. What Tri-Valley's duty would be concerning the production of evidence bearing upon the lawfulness of competitive prices then becomes immaterial, for there would be no competitive prices within the contemplation of the proviso.

The Commission should accordingly deal first with this question on the facts and law and, indeed, until it has done so it will not be known whether this court will have to deal with that question or any other question concerning the "meeting competition" defense.

A remand of the cause is therefore necessary for further proceedings bearing upon the unresolved price discrimination question to which we have previously referred, and upon the question of whether the competition which Tri-Valley faced in the California Street market is the kind of competition contemplated by the "meeting of competition" defense of section 2(b).

We now consider the arguments relating to the charge that, in granting certain allowances to Central Grocers, Inc., of Boston, Massachusetts, and Fred Meyer, Inc., of Portland, Oregon, Tri-Valley violated section 2(d) of the Act, forbidding unequal treatment of customers with regard to promotional allowances.

In the Boston area Tri-Valley sold its products in 1957 and 1958 to four customers.

One of these is Central Grocers, a quasi-cooperative owned by approximately one hundred retailers in that area. With regard to these retailer-members, Central Grocers operates as a wholesaler, buying goods from Tri-Valley and other sources, warehousing them in Boston, and reselling them to its retailer-members. Central Grocers also acts as a wholesaler in distributing food products to twenty-five independent retailers, the latter distribution representing about fifteen per cent of Central Grocers' volume. The company bought canned fruits and vegetables from Tri-Valley under Central Grocers' private label.

Another customer of Tri-Valley in the Boston area is First National Stores. This is a retail chain owning and operating approximately 135 to 140 retail

stores in the Boston trade area. These are among the 197 First National retail stores which are serviced from the company's Boston warehouse.

Tri-Valley's third customer in that area is Great Atlantic & Pacific Tea Company. A. & P. is a retail chain and, in the Boston area, maintains 163 stores, all serviced from its Boston warehouse. Some eighty-one of these stores are in the Boston metropolitan area.

Tri-Valley's fourth customer in that area is Standard Grocery Company, a wholesaler with one warehouse located in Boston. Standard supplies some seven hundred small or medium size independent grocers in the Boston area.

One of the selling methods employed by the first of these Tri-Valley customers, Central Grocers, involves the use of a buying or order guide which is distributed to its retail stores about once a month.[19] In 1957 and 1958, Tri-Valley had an arrangement with Central Grocers by which it ostensibly paid $37.50 a quarter, or a total of $150 yer year for an advertising mat in the guide which featured Central Grocers' private label canned fruits. The substance of the arrangement, however, was that Tri-Valley would pay to Central Grocers ten cents per case or $150 for the first 1,500 cases of canned fruits purchased by it, and an additional ten cents per case for each case of goods thereafter purchased during the year. These pay-

[19]It is probable that this method is utilized with regard to all accounts, "affiliate" as well as retailer-members, but this is not entirely clear in the record.

ments were made in consideration of supplying Central Grocers' private label canned fruits, and in "return for that business and to move that volume of merchandise."

Tri-Valley did not offer or make available these arrangements on proportionately equal terms to any of its other three customers in the Boston area.

In the Portland, Oregon area, Tri-Valley sold its products to two customers. One of these is Fred Meyer, Inc., which operates twelve retail stores which cover the entire Portland area, including several stores within the city limits. Tri-Valley's other customer in that area is Hudson House, Inc. This company is a wholesaler, supplying about 286 retail stores, of which ninety-seven are in the Portland area, many of these within the city limits. Hudson House also owns several Piggly Wiggly retail stores in Portland. The company also services non-retailer customers such as restaurants and hotels.

In September and October, 1957, Meyer instituted a "coupon book" program. These books were pocket-sized pamphlets containing detachable coupons illustrating various products offered by Meyer to the purchasing public. Tri-Valley contracted with Meyer to participate in this coupon book program. In this contract, Tri-Valley agreed to pay $350, as and for the cost of printing the private label peach coupons, and to redeem each coupon at the rate of $0.248.

By the terms of these coupons Meyer offered to sell three cans of its private label peaches for the price of

two. Petitioner complied with the terms of this contract and, in 1957, redeemed 20,750 coupons turned in by Meyer.

Tri-Valley also paid Hudson House a promotional allowance of one hundred dollars, but this payment did not have a proportional relationship to the payment made to Meyer.

There are three essential elements which must be established in order to prove a violation of section 2(d). We designate them as (a), (b) and (c) in this paraphrase of the statute: Where (a) two or more customers of a particular seller compete with each other in the distribution of the products of that seller, (b) the latter shall not pay or contract for the payment of anything of value to or for the benefit of such a customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the sale, or offering for sale of any products sold or offered for sale by the seller, (c) unless the allowance is available on proportionally equal terms to the competing customers.

The Commission found, with respect to both the Central Grocers and Meyer allowances, that the facts establish all three of the essential elements referred to above.

Tri-Valley challenges the Commission findings with regard to the first two of these elements.

With regard to the second of these factors Tri-Valley maintains that the payments made to Central Grocers and Meyer were not in consideration of any

services rendered or to be rendered by those two customers in the sale or offering for sale of any goods sold by Tri-Valley. Rather, petitioner contends, the payments were made to induce or facilitate the original sale of the goods without exacting benefits, services or facilities from these customers.[20]

Our review of the evidence convinces us that the Commission was warranted in finding that the allowances given Central Grocers and Meyer were in compensation for the promotion, over a period of time, of Tri-Valley's line of products, and were not given exclusively, if at all, to facilitate the original sale by Tri-Valley to those two customers.

Questioning the Commission findings with regard to the first of the three section 2(d) elements referred to above, Tri-Valley contends that there is no substantial evidence to support the finding that customers of Tri-Valley who did not receive allowances proportional to those given Central Grocers and Meyer, in fact competed in the distribution of Tri-Valley products with customers of Tri-Valley who did receive allowances. Actual competition was not proved, petitioner contends, because Tri-Valley products were not traced to the shelves of any two Tri-Valley customers who were in such geographical proximity as to indicate that they were in competition with each other,

[20]It has been held that the mere acceptance by a customer of an allowance intended to facilitate the original sale does not constitute the rendering of a service or facility by the customer within the meaning of section 2(d), although it may be a price discrimination under section 2(a). See New England Confectionery Co., 46 F.T.C. 1041, 1059 (1949); Rowe, Price Discrimination under the Robinson-Patman Act (1962), pp. 107, 379.

one of whom had received the allowance, and the other of whom had not.

In our opinion, where a direct customer of a seller, operating solely on a particular functional level such as wholesaling or retailing, receives a promotional allowance not made available to another direct customer operating solely on the same functional level, it is unnecessary to trace the seller's goods of like grade and quality to the shelves of competing outlets of the two in order to establish competition. It is sufficient in that case to prove that one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time. Actual competition in the sale of the seller's goods may then be inferred even though one or both of the customers have other outlets which are not in geographical proximity to outlets of the other customer.

The view just expressed is in keeping with the underlying purpose of section 2(d). That purpose is to require sellers to deal fairly with their customers who are in competition with each other, by refraining from making allowances to one such customer unless making it available on proportionally equal terms to the others. In its practical operation this objective cannot be achieved unless sellers who propose to make such an allowance assume that all of their direct customers who are in functional competition in the same geographical area, and who buy the seller's products

of like grade and quality within approximately the same period of time, are in actual competition with each other in the distribution of these products. If this is the assumption upon which sellers must act to avoid a section 2(d) violation, it is the assumption upon which courts may proceed in determining whether there has been a violation.

In the case before us, however, no set of circumstances has been called to our attention which meets the criteria suggested above. Central Grocers, one of those charged with receiving an allowance not made available to competitors, is a wholesaler doing business in the same geographical area as another wholesaler, Standard Grocery Company, which did not receive an allowance. Thus, there was functional competition between them. But our attention has not been called to any evidence in this record indicating that, during approximately the same period of time, Tri-Valley sold canned goods to both Central Grocers and Standard Grocery.

The only pertinent exhibit which has been called to our attention (Comm. Ex. 45), shows one sale to Standard Grocery in April, 1957, but none to Central Grocers any time that year. Presumably there were some sales to Central Grocers in that year since the allowance in question was extended in 1957 as well as in 1958. But whether any such 1957 sale to Central Grocers was in April, or sufficiently close to April, so that this wholesaler and Standard Grocery could be said to be in competition, is not established by any part of the record called to our attention.

If there is presently evidence in the record which would show such proximity as to time of purchases by Central Grocers and Standard Grocery, or if evidence is later adduced showing this, then as to these two customers of Tri-Valley actual competition would be established and, as to them a section 2(d) violation would be established. If this is the only section 2(d) violation established, however, flagrant or extensive violations of that statute would not be shown and the cease-and-desist order should accordingly be of limited scope. See Swanee Paper Corp. v. Federal Trade Comm'n, 2 Cir., 291 F.2d 833, 838.

The other direct customers of Tri-Valley in the Boston area, none of whom received a proportional allowance, are retailers and, as such, are not entitled to treatment comparable to that accorded Central Grocers, because not in functional competition with that wholesaler. See Atalanta Trading Corp., 53 F.T.C. 565, 566, 573 rev'd on other grounds, Atalanta Trading Corp. v. Federal Trade Comm'n, 2 Cir., 258 F.2d 365. As to them the only way of showing a section 2(d) violation would be to treat Central Grocers' retail outlets as "indirect" customers of Tri-Valley. This, however, may not be done in the absence of a showing that Tri-Valley engaged in a course of direct dealing with those retail outlets.[21] No such showing was made here.

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[21] See Klein v. Lionel Corp., 3 Cir., 237 F.2d 13; Rowe, supra, § 13.11, pp. 398-399; contra Krug v. International Tel. & Tel. Corp., D.N.J., 142 F.Supp. 230. Examples of direct dealing sufficient to give application to the "indirect" customer concept, are to be found in American News Co. v. Federal Trade Comm'n, 2 Cir., 300 F.2d 104; Elizabeth Arden, Inc. v. Federal Trade Comm'n, 2 Cir., 156 F.2d 132; K. S. Corp. v. Chemstrand Corp., S.D.N.Y., 198 F.Supp. 310; Champion Spark Plug Co., 50 F.T.C. 30, 44.

In the Portland area, Meyer, which received an allowance, is a retailer, and Hudson House, which did not receive a proportionally equal allowance, is principally a wholesaler, but may also be a retailer.[22] No section 2(d) violation was shown as to the wholesale operation of Hudson House, because that operation was not in functional competition with Meyer, and it was not shown that the independent retailers served by Hudson House were "indirect" customers of Tri-Valley.[23] No section 2(d) violation was shown as to the retail operation of Hudson House, if there was such an operation, because it was not shown that any Tri-Valley goods were purchased indirectly by those Piggly-Wiggly outlets, during the period in question. This could only have been shown by tracing Tri-Valley goods to the shelves of those stores by means of the best evidence available.

For the reasons stated above we hold that the Commission findings and conclusions to the effect that Tri-Valley violated section 2(d) must be set aside. As we have remanded this cause for further proceedings with regard to other matters we think it appropriate to afford the Commission, on such remand, the opportunity of calling attention to evidence presently in the record, or of producing additional evidence, which will overcome the present seeming, or actual,

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[22]If Hudson House does any retailing, it is because of its ownership of several Piggly Wiggly stores in the Portland area. Each of these is apparently a separate corporate entity and Tri-Valley contends that they are dealt with by Hudson House just as if they were independent retailers.

[23]See this opinion opposite note 21.

lack of factual support for the section 2(d) charges as discussed above.

Any judicial review following the entry of Commission orders resulting from procedings on remand may be upon the present record and briefs as appropriately supplemented.

Tri-Valley's final argument on this review pertains to the form of the cease-and-desist order which has been entered, it being asserted that, in its breadth and scope, the order exceeds the legitimate needs of the case.

Since the Commission order is being set aside as to both the section 2(a) and section 2(d) issues, it is unnecessary to deal with this argument.

The order is reversed and the cause is remanded for further proceedings as directed herein.

## Appendix "C"

United States of America
Before Federal Trade Commission

Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

| | |
|---|---|
| In the Matter of Tri-Valley Packing Association, a corporation. | Docket No. 7225<br>Docket No. 7496 |

### *FINAL ORDER*

This matter having been heard by the Commission upon respondent's appeal from the initial decision on remand and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having denied the appeal and determined that the initial decision should be modified for clarification and to conform it to the views set forth in its opinion and that as so modified it should be adopted as the decision of the Commission:

IT IS ORDERED that the initial decision on remand be, and it hereby is, modified by striking therefrom the following:

The last two sentences in the second full paragraph on page 2.

The words "if this be a part of a Section 2(b) defense", third paragraph, page 16.

The words "as part of a Section 2(b) defense or", second paragraph, page 18.

The third sentence in the third paragraph on page 21.

The second paragraph beginning with the word "Summarized" and the third paragraph, page 27.

The first full paragraph, page 28.

Following the words "Federal Trade Commission" in the first paragraph under "Conclusions" on page 28, the comma and the phrase "is reducible to the following summary of conclusions reached by the court in appraising the evidence and findings of the Commission", and in this paragraph the word "that".

The paragraphs beginning with the paragraph identified as (a) under "Conclusions" on page 28 and ending with the last full paragraph on page 31, inclusive.

All of footnote 48, starting with the word "However".

IT IS FURTHER ORDERED that the initial decision be, and it hereby is, modified by substituting the word "reservation" for the word "season" in the third sentence in the second full paragraph on page 22 thereof.

IT IS FURTHER ORDERED that the order be, and it hereby is, modified to read as follows:

*ORDER*

IT IS ORDERED that respondent, Tri-Valley Growers, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Discriminating in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with customers of such purchaser.

2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent, pursuant to a specially tailored or negotiated arrangement, as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

IT IS FURTHER ORDERED that the initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that respondent, Tri-Valley Growers, shall, within sixty (60) days after service of this order upon it file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the terms of the order contained herein.

By the Commission. Commissioner Elman dissented and has filed a dissenting opinion.

(Seal)

/s/ Joseph W. Shea
Joseph W. Shea,
Secretary.

Issued: July 28, 1966

Attached are: (1) Opinion of the Commission
(2) Dissenting Opinion by Commissioner Elman

United States of America
Before Federal Trade Commission
Commissioners:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

| | |
|---|---|
| In the Matter of<br>Tri-Valley Packing Association,<br>a corporation. | Docket No. 7225<br>Docket No. 7496 |

## *OPINION OF THE COMMISSION*

This matter is before the Commission upon the respondent's appeal from the hearing examiner's initial decision on remand, filed April 15, 1965. The hearing examiner, considering the whole record, including the transactions referred to by the court and the new evidence on remand, found and concluded that respondent had violated Sections 2(a) and 2(d) of the amended Clayton Act, as charged in the complaint. His decision contains an order to cease and desist the practices so found to be unlawful.

The Commission previously, on May 10, 1962, entered an order to cease and desist in this matter (*Tri-Valley Packing Association,* 60 F.T.C. 1134), which order was appealed to the United States Court of Appeals for the Ninth Circuit. That court reversed the Commission's order and remanded the cause for

further proceedings in accordance with its opinion. *Tri-Valley Packing Association v. Federal Trade Commission,* 329 F.2d 694 (9th Cir. 1964).[1] The court directed further findings or consideration on three points: (1) Whether or not a causal link existed between the seller's prices and the impact on customer competition, or, more specifically, whether the goods were generally available in the so-called "California Street" market so that in turn a determination can be made on whether the injury was due to the price discrimination rather than the failure of the disfavored purchasers to take advantage of the opportunity to buy (*id.* at 703, 704); (2) the threshold issue of whether the prices allegedly met were competitive prices within the contemplation of the Section 2(b) proviso (*id.* at 706), and (3) the question of the existence of evidence or the sufficiency of such evidence as may exist in the record to support the Section 2(d), Clayton Act charge (*id.* at 710).

*Statement as to the Facts*

A recapitulation of the facts previously found by the Commission and concurred in by the court will help establish the framework within which the questions on remand are to be considered. Tri-Valley is a cooperative corporation located in San Francisco, California. It is engaged in the business of selling and distributing canned fruits and vegetables, all of

[1]The court set aside the Commission's findings and conclusions on the Section 2(d) charge and it set aside the order of the Commission on both the Section 2(a) and Section 2(d) charges. (*Id.* at 710.)

which it processes and cans at its plants in California. It sells and distributes these products under the private labels or brands of its purchasers and also under its own brands or labels. In the course of this business products of like grade and quality are sold to a large number of customers located throughout the United States for use, consumption or resale. For the fiscal year ending January 31, 1959, its sales amounted to $22,329,877.

Respondent includes among its customers wholesalers, retailers, chain stores and cooperative associations. Certain of these customers, including some twelve to fifteen retail grocery chains, maintain buying agencies in San Francisco. In the course and conduct of its business Tri-Valley has sold its products to these customers at lower prices than it has sold products of like grade and quality to customers who did not maintain their own buying agencies in San Francisco. The difference in prices charged customers between those who maintained buying agencies and those who did not ranged from 5 cents to 50 cents or from 2 percent to 10 percent per case.

The record contains a large number of instances of price discriminations by Tri-Valley in favor of certain large chain stores and against wholesalers and retailers in the sale of canned fruits and vegetables of like grade and quality. Among the examples of price discrimination between direct buying purchasers previously listed by the Commission is the following:

"In March 1957, respondent sold products designated as Choice Heavy Syrup Sliced Y. C.

> Peaches to Safeway Stores in Denver, Colorado, at $5.30 per case, and to H. A. Marr in Denver, Colorado, at $5.55 per case." (60 F.T.C. 1180.)

The court considered this example in detail and it agreed that the Commission's finding of price discrimination was supported by the evidence. The court stated that the unchallenged evidence showed that Tri-Valley sold peaches of like grade and quality to Safeway at $5.30 per case and to Marr at $5.55 per case, a price differential of 4.5 percent. Further, the court concluded that, in this example, the evidence was adequate to support the Commission's finding of competition in retail sales between Safeway and Marr. (*Id.* at 701.)

The Commission additionally found the existence of competition in the sale of respondent's food and grocery products between the favored chain stores and "independent retailers who were selling private label canned goods which they had purchased from non-favored wholesalers." (60 F.T.C. 1180.) The court concurred. It held the record evidence is sufficient to support the Commission finding that Foodland, Preisser, Piggly Wiggly No. 10 and Ce Buzz (retailers in the Denver area who purchased canned goods from wholesaler H. A. Marr) were all in actual competition with Safeway in the Denver area in 1957, in the resale of private label canned goods of the kind which each obtained that year from Tri-Valley. The court also held that while the evidence concerning actual direct and indirect competition between purchasers may be insufficient as to some of the other purchasers

and areas "for most purchasers and areas [it is] sufficient to support the Commission findings." (329 F.2d at 702.)

The price discriminations shown in the record are substantial. There was testimony that those engaged in the resale of such products operate on a very narrow margin—so narrow that it is essential to take advantage of two percent discounts for cash. These discriminations in price, on the other hand, range from 2 percent to 10 percent. In view of the highly competitive nature of the business, price disparities of this kind could well endanger the ability of the merchants paying the higher price to compete with the favored chain retailers. (329 F.2d at 703.)

In the course of its business, Tri-Valley also granted certain allowances to Central Grocers, Inc. of Boston, Massachusetts and to Fred Meyer, Inc. of Portland, Oregon. Each of these allowances was granted pursuant to a specially tailored or negotiated arrangement, and no arrangement on proportionally equal terms was offered or made available to other purchasers of Tri-Valley products serving, at least in part, the same areas served by Central Grocers and Meyer. (329 F.2d at 697.) Further details on the facts as to such allowances are stated hereafter in this opinion in connection with the discussion of the 2(d) Clayton Act charge.

*Availability of the Lower Prices—*
*First Issue on Remand*

On the appeal before the Ninth Circuit Court of Appeals, respondent argued that the evidence affirmatively shows that the nonfavored buyers could have availed themselves of the lower prices for which Tri-Valley and its competitors sold these goods in San Francisco. The court, in its opinion, stated that if the lower price would have been available to the nonfavored buyer in the same market where the favored buyer made his purchase, the probability of competitive injury due to the fact that the nonfavored buyer paid more for the product is not the result of the price discrimination, but of the nonfavored buyer's failure to take advantage of the opportunity, equally available to him, of buying at the same low prices.

Respondent's main position seems to be, as it was before the court, that there is no obstacle which prevented the nonfavored purchasers from buying Tri-Valley products in the so-called "California Street" market in San Francisco. This position, plainly, is based on respondent's assertion that there is a California Street market and a California Street price. The examiner, however, found that there is no California Street market price. He also found, on the evidence, including that adduced on remand, that the lower prices granted by respondent to the favored chains were not made available to the unfavored purchasers.

The record does not support respondent's argument about a California Street market. The main source of

information on this claimed market and its prices is the indefinite and inconclusive testimony of respondent's assistant sales manager Russell Snyder, which the hearing examiner apparently gave little weight. Pertinent excerpts follow:

[*Prior to Remand*]

By Mr. Snyder:

Q. And as a general statement; isn't it true that the "market price applicable to California Street" is lower than "the market price of the rest of the general market?"

A. I don't think we should use "California Street", that is too much of a colloquialism.

Hearing Examiner Buttle: Yes. What is it? Do you know what it means?

The Witness: Yes, I know exactly what it means. It means these buyers out here for A & P and the rest of the chain stores, that is considered California Street. That is where most of our merchandise is sold in this business. (Tr. 944.)

* * *

A. The prices are as low or lower as a general statement.

Whether we are bringing in this market again, that is a matter of interpretation, but the prices as a general statement are no higher on California Street than they are anywhere else.

By Mr. Snyder:

Q. As a matter of fact, they are generally lower; aren't they, Mr. Snyder?

A. Very often. (Tr. 945.)

[*After the Remand*]

Hearing Examiner Buttle: But your testimony is in certain instances, if they were on Cali-

fornia Street, they would get better prices; that's so, isn't it?

The Witness: Yes. In certain instances, but, on the other hand, Your Honor, I may say in certain instances they may get lower prices if they weren't on California Street. (Tr. 1353.)

* * *

Hearing Examiner Buttle: Well, how would I know, in looking at these price lists, that if I purchased on California Street I would get a better price than if I purchased elsewhere, if there was any knowledge in the industry of this fact? How would I ascertain it from the data which I would receive as a broker? * * *

The Witness: Specifically, any prices that were quoted on California Street were to be available to any other customer, and he should know about it through other brokers, through publications, through cannery sales lists, through any number of sources. * * * I am speaking of generally, just of general pricing level of California Street we are talking about.

Hearing Examiner Buttle: Well, are you telling me that it was nationally known that you could do better on California Street than elsewhere? You are not telling me that, are you?

The Witness: No, sir.

Hearing Examiner Buttle: It was not nationally known among brokers, I mean?

The Witness: I think anyone could buy.

Hearing Examiner Buttle: What is that?

The Witness: Your Honor, I think anyone could buy from California, could buy merchandise on the general market levels as cheaply as California Street, anywhere in the country. (Tr. 1355-56.)

* * *

Hearing Examiner Buttle: In other words, you are telling me they could buy from Tri-Valley at the same price they could buy in California Street?

The Witness: I am speaking of it generally, in general, yes. If it was a particular competitive situation we met on California Street, or a particular lot——

Hearing Examiner Buttle: Well, your testimony is that prices were only better in particular situations. What I am trying to find out from you is, if it isn't a particular situation, how is it all the brokers or purchasers should have common knowledge of it on a nationwide basis?

The Witness: Well, they wouldn't have any particular situations, Your Honor, just general terms. (Tr. 1357.)

This does not show, nor is there other evidence in this record showing, that the California Street market exists, as respondent appears to contend, as a kind of commodity exchange and that the price quotations are open and notorious. While the prices, though not identified as California Street prices, assertedly were carried in various trade journals and financial journals, no such publications were offered in evidence. There is no precise information in the record as to the form and manner of such quotations. It appears fairly certain from Mr. Snyder's statements, however, that the listings in the journals did not mention specific transactions; rather, they showed just the "general pricing level of California Street". (Tr. 1356.) It was not explained how this would inform the prospective purchaser that Tri-Valley's goods were

than it charged various wholesalers buying goods of like grade and quality through brokers (Pet. App. 12).[1] Noting petitioner's claim that it had granted the lower prices in good faith to meet the equally low prices of its competitors for sales to the direct buying chains on California Street, the Commission held that petitioner had not sustained its burden of showing that it had reason to believe that the prices of its competitors were lawful and therefore it had not established its good faith under Section 2(b) (Pet. App. 20–21). In view of this disposition, the Commission found it unnecessary to determine whether, as a matter of fact, petitioner's lower prices had actually been granted to meet its competitors' "California Street" prices.

In addition, the Commission found that respondent had granted discriminatory allowances in violation of Section 2(d) to Fred Meyer, Inc., of Portland, Oregon, and to Central Grocers, Inc., of Boston, Massachusetts, without offering similar arrangements to competing purchasers (Pet. App. 21–23).

*The First Court of Appeals Decision.* The court of appeals sustained the Commission's findings of price discrimination (Pet. App. 40–43). It remanded the case to the Commission, however, for further consideration of "the facts pertaining to the availability, to nonfavored purchasers, of the low prices for Tri Valley products on the California Street market, and

[1] For example, the Commission found that in the Denver area petitioner discriminated in favor of Safeway Stores, a large retail chain, and against H. A. Marr, a wholesaler serving various retailers in the Denver area who compete directly with Safeway for retail sales (Pet. App. 4–6).

the application of the law to those facts" (Pet. App. 49). Such a determination, it held, was necessary to demonstrate a causal nexus between the challenged prices and the injury to competition (Pet. App. 48).

With respect to petitioner's Section 2(b) defense, it held that the Commission had not answered a "threshold question," *viz.*, whether "a lowered price is within the proviso of Section 2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system such as that represented by the California Street market" (Pet. App. 54). It directed the Commission to "deal first with this question on the facts and law" (*ibid.*).

Finally, the court ruled that the evidence with respect to the Section 2(d) violations in the Boston and Portland areas did not disclose whether the allowances had been granted within the same time period that petitioner was selling in those areas to non-favored customers, and did not disclose whether non-favored retailers were indirect customers of petitioner in functional competition with the favored customers. As to this issue it decided, in the light of its remand with respect to other matters, to afford the Commission the opportunity to cite evidence in the record or to adduce additional evidence which would overcome these defects (Pet. App. 63).

*The Commission's Proceedings on Remand.* On remand, further hearings were conducted before an examiner who, on the basis of the entire record, including the new evidence, again held that petitioner had violated Sections 2(a) and 2(d). After hearing

petitioner's exceptions, the Commission adopted this determination with certain modifications.

As to the first issue on remand—the availability of the lower "California Street" prices to other purchasers—the Commission found that the evidence did not show that the California Street market was a commodity exchange where price quotations are open and available to individual buyers (Pet. App. 77). Rather, it found that the market is "no more than a location for individual buyers—mostly chain stores—who enter into their own private agreements with various California canners" (Pet. App. 78). These chains, it found, were able to obtain special low prices not available to others (*ibid.*).

The Commission viewed the second issue on remand—the meeting competition defense—as "whether the alleged meeting of the so-called California Street market prices was in fact meeting 'an equally lower price of a competitor', *i.e.*, a response to individual competitive demand rather than the meeting of prices on a systematic basis not contemplated by the proviso" (Pet. App. 83). The Commission found that the record did not show that petitioner or its competitors were selling pursuant to, or to meet, some pricing system employed on California Street; and it further found that petitioner had not shown that it had reduced its prices in response to individual competitive demands. The Commission noted that it had previously "accepted [Tri Valley's] assertions that its price discriminations were made only in response to the prices of its competitors" (Pet. App. 85) and that it had rejected this defense on the ground that Tri Val-

ley had failed to show that it had reason to believe the lower prices it was allegedly meeting were lawful. In light of the remand, however, it concluded that it should re-examine the factual premise it had previously assumed (Pet. App. 86). It noted that in the first hearing the examiner had concluded that there was an " 'absence of evidence sufficiently establishing that the discriminatory prices were to meet individual competitive situations' " (Pet. App. 87) and that on the remand the same examiner again found that petitioner had not shown "that its price reductions were made defensively to meet the prices of competing sellers in specific transactions" (*ibid.*). After reviewing the evidence it found that this determination was correct and ruled that there was no factual basis for Tri Valley's "meeting competition" defense.

On the third remanded issue—the evidence as to the Section 2(d) charge—it found substantial evidence that petitioner was selling to non-favored customers in the Boston area at the same time it was granting allowances to favored purchasers there; and that Safeway Stores of Portland, who were direct customers of Tri Valley, did not receive the allowances given to Fred Meyer, Inc., in that area (Pet. App. 89–96).

Accordingly, the Commission entered a second cease-and-desist order (Pet. App. 65).

*The Second Decision of the Court of Appeals.* On the second petition for review Tri Valley raised six points, including contentions that the Commission was without power to consider further evidence on the two price discrimination issues; that the Commission had

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violated the court's mandate by re-litigating an issue which had originally been decided in petitioner's favor—*i.e.*, that it had in fact lowered its prices to meet the lower prices of its competitors; and that the order was too broad in the circumstances. The same panel of the court of appeals that had heard the first case unanimously rejected all of petitioner's contentions. It modified the Section 2(d) provision of the order to provide, in accordance with this Court's decision in *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, that petitioner was barred from granting allowances unless they were made available to all customers on proportionally equal terms, including indirect purchasers who compete with the favored customers.

## ARGUMENT

The issues which petitioner would have this Court review concern the court of appeals' construction of its own mandate and the scope of the Commission's order. No general question of public importance is presented, and the decision of the court below is correct.

1. Although this Court is never foreclosed from determining the issue for itself, "[o]bviously, the court which drafted the mandate is normally in the best position to determine whether the Commission's subsequent order is consistent with the mandate." *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379. The court of appeals' first opinion shows that the court expected the Commission to develop fully both the factual and the legal aspects of the three questions presented on remand. Thus,

as to the first question—the availability to non-favored purchasers of the lower California Street prices—the court stressed the Commission's duty to find the facts and determine the application of the law to them (Pet. App. 49–50). As to the meeting competition question, it said that the Commission should "deal first with this question on the facts and the law * * *" (Pet. App. 54); and with respect to the Section 2(d) violation, it specifically noted that, in light of the remand as to other matters, the Commission should have the opportunity to reconsider the record or produce additional evidence which might overcome the lack of factual support the court had found (Pet. App. 63–64).

These terms of the court of appeals' remand fully accorded with decisions of this Court holding that when an agency decision is set aside by a reviewing court for factual inadequacy or legal error it remains in the agency's power, and is its responsibility, to find the facts and apply the law so as to carry out the legislative policy in its charge. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 200; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145; *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. R. Co.*, 379 U.S. 642.

Petitioners errs in its assumption that the Commission initially found with respect to the Section 2(b) defense that it had in fact been offering low prices to meet its California Street competition and

then reversed this finding on remand. The Commission's first opinion noted only that petitioner *claimed* to have met the prices of competitors. Assuming this factual premise for purposes of its legal analysis, it then rejected the "meeting competition defense" on the ground that, even if the facts were as petitioner claimed, Tri Valley had not shown circumstances which would lead a reasonable person to believe that the lower prices being met were lawful (Pet. App. 20).[2] And on review of that decision, the court of appeals recognized that the Commission's ruling on the Section 2(b) issue was not based on a finding that petitioner had in fact met the lower prices of its competitors (Pet. App. 50–51).[3]

2. There is no merit in petitioner's contention that the Commission's order is too broad because it bars Tri Valley from discriminating in price by selling of its goods of like grade and quality at a higher price than the prices it charges any other purchaser "who in fact competes with the purchaser paying the higher

[2] See *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 757–758; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231.

[3] Petitioner's further contention that the Commission had no power to consider evidence bearing on the facts because it had not obtained authorization from the court of appeals under Section 11(c) of the Clayton Act, 15 U.S.C. 21(c), confuses the agency's powers after a remand with its powers to take evidence while the case is pending on review in the court of appeals. Section 11(c) provides that while a court of appeals has jurisdiction of an order of the Commission on review, it may, on application of the parties, order additional evidence to be taken by the Commission. This provision has no application, however, to a case, such as the present one, which has been remanded to the Commission for further consideration.

price or with customers of such purchaser" (Pet. App. 67). This aspect of the order plainly relates to the violations found, is well within the intendment of the price discrimination provisions of the Robinson-Patman Act (Pet. App. 121) and is a proper exercise of the Commission's broad remedial discretion. *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 612–613; *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 55; *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473; *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 428; *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 394–395. And of course the Act's defenses are implicitly incorporated in the order. *Federal Trade Commission* v. *Ruberoid Co., supra,* 343 U.S. at 476.

Similarly without merit is petitioner's objection to that part of the order enjoining its violations of Section 2(d) (Pet. 24). The Commission and the court of appeals found that petitioner had granted discriminatory allowances. It was the Commission's duty in these circumstances to issue an order (subsequently modified by the court of appeals to accord with this Court's decision in *Federal Trade Commission* v. *Fred Meyer, Inc.,* 390 U.S. 341, which involved some of the same promotional allowances respecting Tri Valley as does this case) which remedied this violation. Having violated the Act, petitioner "must expect some fencing in." *Federal Trade Commission* v. *National Lead Co., supra,* 352 U.S. at 431.

## CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

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